BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-292-WS

IN RE:	)	
	)	
Application of Carolina Water Service, Inc. for Adjustment of Rates and Charges and Modification to Certain Terms and Conditions for the Provision of Water and Sewer Service	)	**ORDER ON CAROLINA WATER SERVICE, INC.'S FEBRUARY 14, 2019 PETITION FOR RECONSIDERATION**

This matter is before the Public Service Commission of South Carolina on the Petition for Rehearing and Reconsideration ("Petition") filed by Carolina Water Service, Inc. ("CWS")[1] on February 14, 2019, in which CWS requested the Commission rehear and reconsider a portion of its rulings in Order No. 2018-802. The South Carolina Office of Regulatory Staff ("ORS") moved to dismiss the Petition because CWS filed a Notice of Appeal which divested the Commission of jurisdiction over the Petition. CWS responded in opposition to the motion to dismiss and ORS replied. The Commission granted ORS' motion to dismiss on March 7, 2019. Subsequently, the South Carolina Supreme Court dismissed CWS' notice of appeal as untimely, vacated the Commission order granting the motion to dismiss, and remanded the matter to the Commission to rule on the merits of the Petition. On remand, ORS responded in opposition to the Petition and CWS replied. On September 4, 2019, the Commission granted the request for rehearing. The parties agreed that an additional evidentiary hearing was not necessary and suggested oral

[1] CWS recently changed its name to Blue Granite Water Company but has been referred to as CWS throughout this proceeding. To avoid confusion, the Commission will use CWS for purposes of this Order.

arguments be scheduled. The Commission heard oral arguments from the parties on October 7, 2019.

I. SUMMARY OF FACTS

Order No. 2018-802 granted in part an ORS petition for rehearing and reconsideration. At the evidentiary rehearing prior to the issuance of Order No. 2018-802, the Commission heard testimony from several witnesses presented by ORS and CWS. The Commission discussed that witness testimony extensively in its Order No. 2018-802.

The portion of Order No. 2018-802 about which CWS seeks reconsideration concludes that CWS can not recover from ratepayers $416,093 of litigation expenses associated with its unsuccessful defense of a lawsuit in the United States District Court for the District of South Carolina captioned *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.*, Civil Action Number 3:15-cv-00194-MBS ("Riverkeeper Action"). In the Riverkeeper Action, Congaree Riverkeeper sued CWS for violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, alleging that CWS violated its National Pollutant Discharge Elimination System ("NPDES") permit by failing to connect its I-20 wastewater treatment plant to the regional system and exceeding the NPDES discharges limit for discharges into the Saluda River set in the permit. The NPDES permit included a January 1, 1995 effective date. The Clean Water Act is a strict liability statute. By Order entered March 30, 2017, United States District Judge Margaret B. Seymour granted summary judgment to Congaree Riverkeeper, concluding that CWS violated its NPDES permit for over seventeen years by not connecting to the regional system and by violating the discharge limitations in its permit twenty-three times. *Congaree Riverkeeper, Inc. v. Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733, 755-56 (D.S.C. 2017). The Court ordered a $1,500,000 fine for the failure to connect and a $23,000 fine for the effluent limit violations. *Id.* The Court directed both

fines be paid to the United States Treasury. *Id.* at 756. The Court also permanently enjoined CWS from discharging any treated or untreated waste water into the Saluda River and ordered CWS to connect to the regional waste water treatment plant, in any manner, in accordance with The 208 Water Quality Management Plan for the Central Midlands Region ("208 Plan"). *Id.* at 757.

In her March 30, 2017 Order, Judge Seymour discussed extensively the history of negotiations among CWS, the Town of Lexington, and the South Carolina Department of Health and Environmental Control ("DHEC") regarding interconnection of the I-20 facility with the regional system. She also discussed the interconnection agreement between CWS and the Town of Lexington for which the Commission denied approval in 2000 because CWS had agreed to pay too high a rate for the service received which would have resulted in its customers effectively subsidizing the regional system. *See In re Application of Carolina Water Service, Inc.*, Docket No. 2002-147-S, Order No. 2003-10, 2003 WL 26623818 (S.C.P.S.C. 2003). Judge Seymour considered the evidence presented and found that CWS violated its NPDES permit for over seventeen years and failed to undertake any meaningful attempt to comply with the NPDES permit between 2002 and 2014.[2] *Congaree Riverkeeper*, 248 F. Supp. at 755. She reasoned the NPDES permit placed the onus on CWS to engage in negotiations that would allow CWS to submit a satisfactory agreement for the Commission's approval. *Id.* at 747. CWS had the obligation to contract with the Town of Lexington or take other measures and steps to fulfill the permit requirements. *Id.* She stated that "[w]hile regional connection does require other actors' assistance

[2] CWS argued there were a few communications with the Town of Lexington between 2002 and 2014 related to interconnection. The Commission has reviewed and considered the communications which were made part of the record in this proceeding in reaching its decision. It is not clear whether the communications were part of the record before Judge Seymour, but it is unlikely they would have altered her decision, as the Clean Water Act is a strict liability statute. Accordingly, "the reasonableness or *bona fides* of an alleged violator's efforts to comply with its permit is not relevant in determining whether a violator is liable under the Act." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 496 (D.S.C. 1995).

and approval, [CWS] cannot be rewarded for its lack of a good faith effort to engage in negotiations and receive the required approvals." *Id.* at 747.

In a subsequent Order dated March 26, 2018, Judge Seymour denied in part and granted in part CWS' motion for reconsideration, granted Congaree Riverkeeper's motion for attorney fees, and denied CWS' motions to substitute the Town of Lexington as a party or join the Town of Lexington as a necessary party. The Town of Lexington, by the time of the March 26, 2018 Order, had exercised eminent domain to acquire the CWS I-20 wastewater treatment facility. Judge Seymour declined to reconsider her ruling that CWS violated the Clean Water Act by failing to connect to the regional system and by exceeding effluent limitations. The Court also declined to vacate the $23,000 fine ordered for the twenty-three effluent limit violations. The Court vacated the $1,500,000 fine to allow discovery and argument by the parties on the appropriate fine amount for CWS' failure to connect. The Court authorized an award of attorney fees and litigation costs to Congaree Riverkeeper under 33 U.S.C. § 1365 and Federal Rule of Civil Procedure 54(d) but did not assess the specific amount of attorney fees. Section 1365 is part of the Clean Water Act and provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any *prevailing or substantially prevailing* party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d) (emphasis added).

After the March 26, 2018 Order, CWS, with Congaree Riverkeeper's consent, moved for the appointment of a United States Magistrate Judge to mediate the case. The Court granted the motion. The parties mediated the case, reached a settlement, and requested the Court enter a consent order approving the settlement and entering final judgment. The Court issued the requested order on March 11, 2019. The order incorporated the terms of the parties' settlement agreement. Under the monetary terms of the settlement agreement, CWS agreed to pay $385,000

of attorney fees to Congaree Riverkeeper's legal counsel; donate $350,000 to the Central Midlands Council of Governments to support implementation of its 208 Plan and water quality initiatives of the Midlands Rivers Coalition; and pay $23,000 to the United States Treasury in full satisfaction of any obligation owed by CWS resulting from the operation of the I-20 facility. CWS is not seeking to recover from its customers the $758,000 it agreed to pay to settle the case. The Settlement Agreement terms included that CWS admitted to no violation of the Clean Water Act and the Settlement Agreement was not intended to be an admission of any liability or wrongdoing. The Settlement Agreement also provided that CWS shall have the right to use the Agreement in any proceeding to establish that the Riverkeeper Action ended "after the Court's finding of liability but before the resolution of penalties and attorneys' fees, except that CWS or its agents and/or owners may not use th[e] Agreement to seek vacatur of the Court's March 30, 2017 summary judgment order or of any other final order issued by th[e] Court."

II. ANALYSIS AND DECISION

CWS seeks reconsideration, pursuant to S.C. Code § 58-5-330 and S.C. Code Regs. 103-825, of Order No. 2018-802. Section 58-5-330 provides:

> Within twenty days after an order or decision is made by the commission, any party to the action or proceeding may apply for a rehearing as to any matter determined in the action or proceeding and specified in the application for rehearing and a rehearing must be granted if in the judgment of the commission sufficient reason exists. No right of appeal arising out of an order or decision of the commission accrues in any court to any corporation or person unless the corporation or person makes application to the commission for a rehearing within the time specified. The application must set forth specifically the ground on which the applicant considers the decision or order to be unlawful. The determination must be made by the commission within thirty days after it is finally submitted. If, after the hearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission is of the opinion that the original order or decision, or any part of it, is in any respect unjust or unwarranted or should be changed, the commission may abrogate, change or modify it and, if changed or modified, the modified order must be substituted in the place of the order originally entered and with like force and effect.

In the petition to reconsider, CWS argued the Commission violated provisions of S.C. Code § 1-23-320 and the due process clauses of the South Carolina and United States Constitutions because the basis for the Commission's ruling denying recovery of litigation expenses for the Riverkeeper Action was different from the basis upon which the Commission granted rehearing. CWS also asserted its uncontradicted evidence presented to the Commission showed that CWS' defense of the Riverkeeper Action was prudent, reasonable, unavoidable, and beneficial to ratepayers and that it was an error of law to deny CWS recovery of litigation expenses. Third, CWS argued that because the Riverkeeper Action was still pending at the time Order No. 2018-802 was issued, the Commission should have treated the litigation expenses the same way it treated litigation expenses for other cases, by ordering CWS to establish a regulatory asset to be considered in a future rate case when the final outcome of the Riverkeeper Action was known.

This third ground is now moot because the Riverkeeper Action has concluded. CWS informed the Commission of the settlement via a supplemental memorandum filed on May 21, 2019. In its supplemental memorandum, CWS argued the settlement provided substantial benefits to customers, including that Congaree Riverkeeper agreed, for a period of five years, it would bring no legal action against CWS asserting that it failed to connect two other wastewater treatment facilities known as Watergate and Friarsgate to the regional wastewater system. CWS stated Watergate and Friarsgate were in similar situations to the I-20 facility.

The Commission has considered carefully the arguments CWS set forth orally and in writing in support of its motion to reconsider. These arguments, however, do not support a decision to alter the Commission's Order No. 2018-802. In Order No. 2018-802, the Commission relied, in part, on the North Carolina Supreme Court's decision in *State ex. rel. Utilities Commission v. Public Staff, North Carolina Utilities Commission*, 343 S.E.2d 898 (N.C. 1986)

and reasoned as follows in determining that CWS should not recover litigation expenses associated with the Riverkeeper Action from ratepayers:

> As a public utility operating under the laws of South Carolina and pursuant to its federally granted NPDES permit, CWS was required to operate its facilities in compliance with federal, state, and local laws. In its orders, the federal court found significant violations by CWS. While the Riverkeeper case is still ongoing as to the penalty to be imposed, the order of the federal court found CWS to be in violation of its permit. We believe it would be improper to impose these expenses upon the ratepayers when the ratepayers were already paying for the Company to provide its services in compliance with its permits and with applicable federal and state laws, and, accordingly, were not deriving any benefit from the expenditure.

Order No. 2018-802, p. 19.

With respect to the first ground for reconsideration, which CWS asserted in its Petition, CWS did not pursue this argument at the oral argument held on the Petition. Regardless, the July 11, 2018 Order granting ORS' request for the initial rehearing encompassed the grounds upon which the Commission ultimately ruled that CWS should not recover the litigation expenses at issue from ratepayers.[3] Further, to the extent CWS asserts it was not on notice of the grounds upon which ORS sought reconsideration, it is now on notice and the Commission provided another opportunity to be heard.

As for the second ground for reconsideration and CWS' supplemental memorandum, which are the primary issues now in contention, a United States District Judge granted summary judgment to the plaintiff in the Riverkeeper Action on the issue of CWS' liability for violating the Federal Clean Water Act and entered substantial fines of $1,500,000 and $23,000. Except for the $1,500,000 fine imposed for the failure to connect, Judge Seymour denied CWS' motion to reconsider her rulings. With respect to the $1,500,000 fine, Judge Seymour gave the parties an

[3] Order No. 2018-494, issued July 11. 2018, granting a rehearing on ORS' petition for reconsideration stated "ORS argued that no litigation costs should be borne by the customers, if for no other reason, than that the courts ruled against CWS in the majority of the actions."

opportunity to conduct further discovery and argument on the appropriate fine amount for the failure to connect. Notably, Judge Seymour did not vacate her ruling that CWS was liable for failing to connect and for exceeding effluent limitations in CWS' NPDES permit. She also did not vacate the $23,000 fine for exceeding effluent limitations on twenty-three separate occasions. Moreover, she authorized an award of attorney fees and litigation costs to Congaree Riverkeeper under a statute only allowing for such recovery to a prevailing or substantially prevailing party. The Court's orders on these issues have not been vacated (except as described above), remain operative, and provide important guidance to the Commission. Further, CWS agreed as part of the settlement agreement it would not seek vacatur of these orders.

No arguments or evidence has been presented which would rise to the level of leading the Commission to reach a conclusion contrary to the one reached by the United States District Court that CWS did not violate the Clean Water Act. The Court considered the arguments and evidence CWS presented to it regarding the difficulties CWS encountered in negotiating with the Town of Lexington and DHEC a connection of the I-20 treatment facility to the regional system. The Commission declines to reconsider its ruling that "it would be improper to impose [Riverkeeper Action litigation] expenses upon the ratepayers when the ratepayers were already paying for the Company to provide its services in compliance with its permits and with applicable federal and state laws, and, accordingly, were not deriving any benefit from the expenditure." Order No. 2018-802, p. 19.

In its Petition for Reconsideration, CWS relied upon the South Carolina Supreme Court's decision in *City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987) and the South Carolina Court of Appeals' decision in *Midlands Utility, Inc. v. S.C. Department of Health and Environmental Control*, 313 S.C. 210, 437 S.E.2d 120 (Ct. App.

1993) (per curiam). Neither case is discussed in Judge Seymour's orders, and it is unclear whether they were presented to her. Regardless, both cases are clearly distinguishable from the present situation. The Supreme Court in *City of Columbia* simply held that the City was subject to regulation by DHEC, which, therefore, could order the City to acquire, by condemnation or negotiation, two private sewer systems owned by Midlands Utility ("Midlands"). *City of Columbia* did not involve violations of the Federal Clean Water Act. In *Midlands Utility*, the Court of Appeals reversed fines, issued under a state statute, associated with effluent discharge violations at the Washington Heights and Lincolnshire wastewater treatment systems that occurred while the City of Columbia was unsuccessfully appealing an order to connect or purchase the two systems. *Midlands Utility*, 313 S.C. at 212-13, 437 S.E.2d at 121. DHEC conceded it was impossible for the Washington Heights and Lincolnshire systems to have met the pollution standards regardless of how well Midlands managed them, unless they were connected to the City of Columbia or extensively upgraded. *Id.* at 213, 437 S.E.2d at 121. The Court of Appeals concluded fines should not have been issued for the discharge violations at the two systems because the City of Columbia was the primary cause of the continued discharges. *Id.*

Again, the record before the United States District Court in the Riverkeeper Action included the negotiations among CWS, Town of Lexington, and DHEC regarding the I-20 system. Nothing presented to the Commission causes it to determine the District Court's conclusion that CWS violated the Clean Water Act was incorrect. Neither *City of Columbia* nor *Midlands Utility* dictate that the operator of a regional wastewater system is solely responsible when an NPDES permit holder, such as CWS, fails to connect with the regional system in compliance with its permit and that the NPDES permit holder cannot be liable for violating the Federal Clean Water Act. It also notable that, in *Midlands Utility*, Midlands argued fines associated with another system, the

Vanarsdale system, were unwarranted where DHEC had denied its request to connect to the City of Cayce's system because granting a permit conflicted with the regional sewerage plan. *Id.* at 213, 437 S.E.2d at 121. The Court of Appeals held there was no abuse of discretion in imposing a penalty for the Vanarsdale system violations which Midlands did not contest occurred. *Id.*

CWS has not demonstrated the defense and resolution of the Riverkeeper Action conferred a substantial benefit on customers, as argued in its supplemental memorandum. The Commission would not have authorized CWS to collect from ratepayers the fines the United States District Court ordered or any altered fine later entered if the case had not settled. As for the Watergate and Friarsgate treatment facilities, CWS has stated these facilities were in a similar situation to the I-20 facility. It follows that CWS was obligated and already being paid by customers to comply with the Clean Water Act in its operation of these facilities, regardless of any agreement with Congaree Riverkeeper to delay suing CWS for five years for any alleged failure to do so. CWS secured nothing for its customers it did not already owe them. The Commission also does not find that CWS conferred a substantial benefit on its customers by preventing the I-20 system from being shut down by the Court in the Riverkeeper Action without a plan in place for customers served by the system. CWS was being paid by its customers to comply with its NPDES permit and find a way to connect with the regional system as required under its NPDES permit, not create an emergency where the I-20 facility was forced to stop operating without alternative arrangements for its customers having been made. In addition, a representative of Congaree Riverkeeper, Bill Stangler, testified at the evidentiary hearing on ORS' petition for reconsideration that Congaree Riverkeeper was not seeking to have CWS terminate sewer service to customers served by the I-20 system and that the Court allowed CWS a year to obtain a resolution to avoid that type of termination. Rehearing Transcript, pp. 267, 277, 337-38.

The Commission's determination is that CWS should not recover from its customers the legal expenses associated with the Riverkeeper Action, regardless of the reasonableness of the charges relative to the work performed, because they were incurred in defending a lawsuit in which CWS was not the prevailing party and was found liable by the United States District Court for the District of South Carolina for violating the Clean Water Act. Therefore, it is not necessary for the Commission to decide whether CWS' attorneys acted reasonably and charged reasonable fees in their defense of the Riverkeeper Action. Ratepayers already were paying CWS to provide its services in compliance with its permits and with applicable federal and state laws.

For the reasons set forth herein, the Petition for Reconsideration filed by CWS on February 14, 2019, is denied.

BY ORDER OF THE COMMISION:

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Comer H. Randall, Chairman

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Justin T. Williams, Vice-Chairman
(SEAL)